SUPREME COURT, U. S.

FILED

SEP 9 1970

E. ROBERT SEAVER, CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, [redacted] 1970

No. 668

SAM NICK FARINELLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MILTON E. GRUSMARK and
NATALIE BASKIN
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MIAMI REVIEW — 371-4853 — 377-3721

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OCTOBER TERM, 1969

No. _____

SAM NICK FARINELLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Sam Nick Farinella, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered July 7, 1970, and denial of Petition for Rehearing entered without opinion on August 10, 1970.

OPINIONS BELOW

The Judgment and Commitment as to Sam Nick Farinella was filed on August 16, 1967 (App. B) on Counts II and III of the Indictment. (App. A)

The decision of the United States Court of Appeals for the Fifth Circuit was entered on January 13, 1969 (App. C). Petition for Rehearing was filed in January 1969 (App. D). It was denied on February 6, 1969 (App. E).

Certiorari was denied without opinion and reported in 394 U.S. 1000. Rehearing denied is reported in 395 U.S. 954.

Motion for New Trial and Supplemental Motion for New Trial, pursuant to Rule 33, Federal Rules of Criminal Procedure, were denied by the trial court. The United States Court of Appeals, Fifth Circuit, affirmed the decision (App. F) on July 7, 1970 and denied rehearing (App. G) on August 10, 1970.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S. Code Section 1254(1). Jurisdiction of this Court is also invoked under Rule 19(1)(b) of the Rules of the Supreme Court of the United States adopted June 15, 1970, effective July 1, 1970, because a Court of Appeals has rendered a decision on an important question of federal law which has not been, but should be, settled by this Court. It is also contended that conflict jurisdiction is present on one question presented.

QUESTIONS PRESENTED

I

WHEN A CONVICTION OF A HOBBS ACT VIOLATION IS UPHELD BECAUSE TWO THOUSAND DOLLARS WERE ALLEGEDLY TAKEN FROM A BUSINESS ENGAGED IN INTERSTATE COMMERCE, AND WHEN NEWLY DISCOVERED EVIDENCE WOULD SHOW THAT THE TWO THOUSAND DOLLARS NEVER IN FACT EXISTED, IS AN EVIDENTIARY HEARING LEADING TO A NEW TRIAL WARRANTED?

II

SINCE THE FEDERAL RULES OF CRIMINAL PROCEDURE DO NOT INCLUDE THE RIGHT TO REVELATION OF GOVERNMENT TRIAL WITNESSES, IS THERE JUSTIFICATION FOR REFUSING TO CONSIDER AS GROUNDS FOR A NEW TRIAL THE FACT THAT TRIAL COUNSEL DID NOT VOIR DIRE THE JURY ON RELATIONSHIP WITH WITNESSES AND THUS DID NOT DISCOVER THE CLOSE RELATIONSHIP BETWEEN A GOVERNMENT WITNESS AND THE FOREMAN OF THE JURY?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Title 28 U.S.C. Section 1254(1)

"By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Rule 19(1)(b) Rules of Supreme Court of the United States

"Where a court of appeals has rendered a decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

18 U.S.C.A. 1951(a)(b)

"Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to

do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family, or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Rule 33, Federal Rules of Criminal Procedure

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

SAM NICK FARINELLA was found guilty on two counts of Hobbs Act violations (18 U.S.C.A. sec. 1951). He was acquitted on two other substantive counts and on a conspiracy count.

The judgment of conviction was affirmed. *U. S. v. Esperti*, 5 Cir. 1969, 406 F.2d. 148. Certiorari was denied. — U.S. —, 22 L.Ed.2d 777.

Motion and supplemental motion for new trial were filed. Affidavits in support of motion were also filed. An evidentiary hearing was sought. The hearing was denied as was the motion. An appeal and affirmance followed. The opinion of the court of appeals is appended as Appendix F. Rehearing was denied. (App. G)

The motions, for the purpose of this petition, were grounded on two points of fact.

1. The two thousand dollars allegedly taken from the company engaged in interstate commerce never existed.

2. The foreman of the trial jury and an important government witness, were very close business associates but no one was made aware of that relationship.

FEDERAL JURISDICTION

Federal jurisdiction in the first instance was based upon an alleged violation of the Hobbs Act, 18 U.S.C.A. 1951.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I

WHEN A CONVICTION OF A HOBBS ACT VIOLATION IS UPHELD BECAUSE TWO THOUSAND DOLLARS WERE ALLEGEDLY TAKEN FROM A BUSINESS ENGAGED IN INTERSTATE COMMERCE, AND WHEN NEWLY DISCOVERED EVIDENCE WOULD SHOW THAT THE TWO THOUSAND DOLLARS NEVER IN FACT EXISTED, IS AN EVIDENTIARY HEARING LEADING TO A NEW TRIAL WARRANTED?

The Court of Appeals stated that an evidentiary hearing on a motion for new trial was not necessary. It also held that a new trial is not justified when the newly discovered evidence is merely cumulative or impeaching. We do not question that principle of law.

In this case, however, the evidence was not impeaching or cumulative. It is believed it required acquittal. It contradicted the original testimony in a manner not raised at the trial.

The testimony originally was concerned with whether or not two thousand dollars was taken from the company. The government said it was. The defendant denied the taking.

But no one ever denied that the two thousand dollars ever existed. The defendant couldn't since he would obviously have no way of knowing. The newly discovered evidence reached the very existence of two thousand dollars alleged to be taken and proved there never was any such money that petitioner could have taken.

The proferred testimony was by the very employee of the company who was alleged to have made the sale that created the income in cash to the company.

This evidence was not cumulative. If believed, it had to cause a different result.

At a minimum, the witness should have been examined at an evidentiary hearing in court.

The presentation of newly discovered evidence should be construed fairly to the accused and ambiguities should not be resolved in favor of the prosecution without inquiry of a proposed witness. See *Hamilton v. U. S.*, 140 F.2d. 679.

Here there was diligence by defendant; there is no contention that the information was not newly discovered; and it would probably produce a different verdict. *U. S. v. Johnson*, 142 F.2d. 588, Cert. dismissed 323 U.S. 806, 89 L.Ed. 643.

II

SINCE THE FEDERAL RULES OF CRIMINAL PROCEDURE DO NOT INCLUDE THE RIGHT TO REVELATION OF GOVERNMENT TRIAL WITNESSES, IS THERE JUSTIFICATION FOR REFUSING TO CONSIDER AS GROUNDS FOR A NEW TRIAL THE FACT THAT TRIAL COUNSEL DID NOT VOIR DIRE THE JURY ON RELATIONSHIP WITH WITNESSES AND THUS DID NOT DISCOVER THE CLOSE RELATIONSHIP BETWEEN A GOVERNMENT WITNESS AND THE FOREMAN OF THE JURY?

Rule 16 of the Federal Rules of Criminal Procedure does not encompass the right of a defendant to secure the names of prosecution witnesses. Many states have such provisions, i.e., the Florida Rules of Criminal Procedure include the right to secure the names of witnesses whose testimony lead to the filing of the information, or witnesses to be used at trial. Florida Rules of Criminal Procedure, Rule 1.220(d) (e).

Under such a procedure an attorney could and should inquire of prospective jurors concerning relationship with and knowledge of potential witnesses. Since he could inquire, he could hardly complain if lack of such inquiry created prejudice by the existence of an undiscovered relationship.

The lack of diligence is visited upon trial counsel here by the Court of Appeals although the power to make such inquiry does not exist.

> " . . . . . there is no representation by the appellants that they requested a list of prospective witnesses which would have enabled them to discover the relationship on voir dire. This alone would establish a lack of diligence which would militate against granting of new trial." *U.S. v. Farinella*, C.A. 5th 1970, July 7, 1970. (App. F.)

Trial by surprise is outmoded. The rules should possibly include the right to secure names that will be important at trial. But, certainly, until that happens, if later information unveils a relationship probably, or even possibly prejudicial, fairness would indicate the propriety of a new trial.

CONCLUSION

Petitioner respectfully urges the granting of the Petition for Writ of Certiorari.

Respectfully submitted,

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Petitioner
1001 North East 125th Street
Miami, Florida 33161

By_____
Milton E. Grusmark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to William G. Earle, Department of Justice, Criminal Division, Post Office Box 1070, Miami, Florida, 33101 and Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, this 8th day of September, 1970.

APPENDIX A

COUNT II

1. That on or about September 13, 1966, in the Southern District of Florida, Anthony Esperti, Sam Nick Farinella, and William Joseph Dara, the Defendants herein, did unlawfully and wilfully, obstruct, delay and affect commerce as defined in Section 1951, Title 18, United States Code, and the movements of articles and commodities in commerce, by robbery, in that the Defendants named herein did obtain from John Edward Maloney and the Red Ball Merchandising Corporation, against their will, property of the said John Edward Maloney and the Red Ball Merchandising Corporation, in the form of money, amounting to $2,000, in currency, payment of which was obtained by means of immediate actual and threatened force, violence and fear of injury.

2. At all t mes pertinent thereto, the Red Ball Merchandising Corporation was engaged in the general merchandising business in the city of Hialeah, Florida; that in connection with such business the said Red Ball Merchandisir g Corporation provided supplies, articles and commodities to manufacturers, dealers and suppliers in various states other than the state of Florida which moved in interstate commerce between Red Ball Merchandising Corporation in Hialeah, Florida to the said manufacturers, dealers and suppliers outside of the state of Florida; and furthermore received supplies, articles and commodities from manufacturers, dealers and suppliers in various states other than the state of Florida, which moved in interstate commerce from the said manufacturers, dealers and suppliers; all of the above in violation of Title 18, United States Code 1951.

COUNT III

1. That on or about September 13, 1966, in the Southern District of Florida, Anthony Esperti, Sam Nick Farinella, and William Joseph Dara, the Defendants herein, did unlawfully and wilfully obstruct, delay and affect commerce as defined in Section 1951, Title 18, United States Code, and the movement of articles and commodities in commerce, by extortion, in that the Defendants named herein did attempt to obtain from John Edward Maloney and the Red Ball Merchandising Corporation, with their consent as such, property of the said John Edward Maloney and the Red Ball Merchandising Corporation, in the form of money, in the amount of $25,000, efforts to obtain payment being induced by the wrongful use of actual and threatened force, violence and fear.

2. At all times pertinent thereto, the Red Ball Merchandising Corporation was engaged in the general merchandising business in the city of Hialeah, Florida; that in connection with such business the said Red Ball Merchandising Corporation provided supplies, articles and commodities to manufacturers, dealers and suppliers in various states other than the State of Florida which moved in interstate commerce between Red Ball Merchandising Corporation in Hialeah, Florida to the said manufacturers, dealers and suppliers outside of the state of Florida; and furthermore received supplies, articles and commodities from manufacturers, dealers and suppliers in various states other than the state of Florida, which moved in interstate commerce from the said manufacturers, dealers and suppliers; all of the above in violation of Title 18, United States Code.

APPENDIX B

(Style and Number Omitted) (Filed August 16, 1967)
R. 1240

JUDGMENT AND COMMITMENT AS TO SAM NICK FARINELLA

On this 16th day of August, 1967, came the attorney for the government and the defendant appeared in person and by counsel, Steadman Stahl, Esq.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a Jury Verdict of Guilty has been convicted of the offense of interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951, as charged in Counts 2 and 3 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS as to Count 2, or until otherwise discharged by due process of law, and TEN (10) YEARS as to Count 3, or until otherwise discharged by due process of law, it being further

ORDERED that sentence imposed as to Count 3 shall run concurrently with sentence hereinabove imposed as to Count 2.

/s/ W. O. MEHRTENS

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25194

ANTHONY ESPERTI,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 25233

SAM NICK FARINELLA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 25234

WILLIAM JOSEPH DARA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(January 13, 1969)

Before BELL and MORGAN, Circuit Judges and GUINN, District Judge.

GUINN, District Judge: Defendants Dara, Farinella and Esperti appeal from conviction on two counts of violation of the Hobbs Act, 18 U.S.C. Sec. 1591[1] the first anti-racketeering statute passed by Congress. Dara received concurrent seven and one-half years on each count. Farinella and Esperti each received concurrent ten year sentences.

On appeal the facts must be considered most favorably to the Government to support the verdicts. *Glasser v. United States*, 315 U.S. 60 (1942).

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[1] §1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family, or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

John Maloney and Joseph Yeager were fifty percent profit-sharing partners in the Red Ball Merchandising Corporation in Hialeah, Florida. Red Ball sold close-out merchandise. Its interstate sales and purchases amounted to ninety percent of its business.

On September 13, 1966, at 4:00 P.M., Maloney was in his office at Red Ball preparing a deposit slip for a $2000 cash bank deposit received via Western Union for a sale to a Chicago customer. The cash was in $100 bills. Maloney left his office and entered Yeager's office where he saw, for the first time in his life, the three appellants. Esperti and Farinella each had guns. Yeager and an employee, William Waldorf, were also in Yeager's office. Esperti's gun was pointed at Yeager and Farinella's at Waldorf.

Esperti grabbed Maloney, threw him on the couch and told him that, "We're here to get the other $25,000.00 for the man in New York." Esperti put the gun alternatively against Maloney's and Yeager's heads and demanded the $25,000 immediately. Meanwhile Dara left the room and reentered with the deposit slip and the $2000 Maloney had been preparing to put in the bank. He said, "Look what I found" and Esperti took it from his adding, "That don't count toward the $25,000." Farinella added, "You've got a lot of merchandise out there. Sell it. Get the money." They left with the $2000. Yeager kept inquiring to whom Red Ball owed the money. This angered Esperti and he hit Yeager.

Two months later Dara and Maloney met at the Shalimar Restaurant and Dara said that he had received a call from New York City to collect some money from

Yeager. Defense counsel were unable to establish that Maloney or Red Ball or Yeager owed any individual any sum of money.

Defendants were acquitted of Count I, a conspiracy charge. They were also acquitted of two remaining substantive counts concerning events of the following day which are not pertinent here.

The first question presented is the sufficiency of the indictment. The indictment satisfies the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure. It is drafted substantially in the words of 18 U.S.C. Section 1951. See *United States v. Green*, 350 U. S. 415 (1956); *United States v. Debrow*, 346 U.S. 374 (1953); *Turf Center v. United States*, 325 F.2d 793 (9th Cir. 1963).

The next question presented is the sufficiency of the evidence to show that the Defendants robbed Red Ball Merchandising Corporation of $2000 as defined in the Hobbs Act. The evidence is sufficient and establishes that $2000 was taken unlawfully from the Red Ball personnel against their will by means of the threatened force of the guns brandished by Farinella and Esperti. It is clear that the taking of $2000 from a business engaged in interstate commerce would obstruct, delay or affect commerce. *United States v. Provenzano*, 3 Cir. 1964, 334 F.2d 678, 692, cert. denied, 379 U.S. 947 (1964); *United States v. Tolub*, 2 Cir. 1962, 309 F.2d 286, 288; *United States v. Kramer*, 7 Cir. 1966, 355 F.2d 891, 898.

The next contention made by the Defendants is that the attempted extortion and consummated robbery did

not obstruct, delay or affect commerce. This contention is without merit. Once the robbery and attempted extortion of Maloney and Red Ball was established, it was not necessary to show that any particular shipment of merchandise moving to and from Red Ball was obstructed or delayed. It is a depletion of the resources of the business which permits the reasonable inference that its operations are obstructed or delayed. *United States v. Provenzano*, Supra.

The Defendants also contend that the witness Maloney should have not been permitted to refresh his recollection with a copy of a statement given by him to an agent of the FBI. It is hornbook law that any writing may be used to refresh the recollection of a witness. See Wigmore, *Evidence* §758. This is true even where the document itself would be inadmissible as evidence. *Williams v. United States*, 7 Cir., 1966, 365 F.2d 21. Caution must be exercised to insure that the document is actually being used for purposes of refreshing and not for purposes of putting words in the mouth of the witness. Such, however, is within the discretion of the trial judge. *Williams*, supra. There was no abuse of this discretion here.

Defendants also object to the trial court's failure to grant motions for severance and the allowance into evidence of certain hearsay testimony. Both these objections relate to alleged bribery and obstruction of justice issues which may not have been equally applicable to all defendants. Defendant Esperti contends that the refusal to sever and the allowance of the hearsay were particularly harmful to him. Esperti, however, joined in a motion to open up this entire area over the objection of the government

and the advice of the court, and he cannot now be heard to complain of prejudice resulting therefrom.

We have examined the defendants' objections to the court's jury charges including those on reasonable doubt and substantial evidence and the court's refusal to admit into evidence the actual tapes of the alleged bribe attempts, and we find them all without merit.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 25,233 and 25,234

SAM NICK FARINELLA and WILLIAM JOSEPH DARA,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing of Appeal from the United States District Court for the Southern District of Florida

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COMES NOW the Appellants, SAM NICK FARINELLA and WILLIAM JOSEPH DARA by their undersigned attorneys and file this Petition for Rehearing and as grounds for such Petition, say:

1. The Court overlooked and failed to consider the total absence of any evidence indicating interference with interstate commerce. The mere existence of interstate transactions by a corporation does not prove that anything done relating to that corporation interfered with interstate commerce. The positive evidence discloses the contrary.

2. The Court overlooked and failed to consider the fact that the importance of the $2,000 items required the granting of Appellants' full right to cross-examination of witnesses concerning that $2,000. That right was infringed upon and limited by the Court yet the option of January 13, 1969, of this Honorable Court reflects the importance of the testimony concerning the $2,000.

3. The Court failed to consider the fact that the finding of not guilty on the conspiracy charge required a finding of not guilty of the substantive count. The Court further overlooked and failed to consider that the absence of any evidence supporting the conspiracy count as to these Appellants rendered the admission of testimony concerning that count prejudicial to the rights of Appellants to a calm, unemotional consideration of the facts concerning the charges upon which the guilty judgment was entered. The bulk of the record concerned the conspiracy charge upon which the Defendants were acquitted. The Court overlooked and failed to consider the fact that if the government had been required to prove the existence of a conspiracy before introducing the prejudicial testimony not related to the creation of the conspiracy itself, fair trial could have been afforded Appellants. Under the circumstances, however, prejudice necessarily resulted.

For the foregoing reasons Appellants respectfully request reconsideration and rehearing of these proceedings.

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellants
1674 Meridian Avenue
Miami Beach, Florida 33139

By_____
MILTON E. GRUSMARK

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed to WILLIAM G. EARLE, c/o U.S. ATTORNEY, Department of Justice, Criminal Division, Post Office Box 1070, Miami, Florida 33101, Attorney for Appellee, on this — day of January, 1969.

_____
MILTON E. GRUSMARK

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 25233 and 25234

SAM NICK FARINELLA and
WILLIAM JOSEPH DARA,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(February 6, 1969)

Before BELL and MORGAN, Circuit Judges, and GUINN, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28754
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM JOSEPH DARA, SAM NICK FARINELLA and ANTHONY ESPERTI,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(July 7, 1970)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: Each of the appellants, Esperti, Dara and Farinella, were found guilty on two counts of violating 18 U.S.C.A. § 1951 (Hobbs Act). Each were also acquitted on a conspiracy count and two substantive counts to violate that Act. In *United States v. Esperti*, 5 Cir. 1969, 406 F.2d 148, we affirmed the judgments of conviction. Certiorari was denied, 394 U.S. 1000, and

rehearing denied, 395 U.S. 954. The appellants then filed a motion for new trial in the District Court on the basis of newly discovered evidence, which was denied. A supplemental motion for new trial, also based on newly discovered evidence, was similarly denied. Appellants appeal from the denial of these motions. We affirm.[1]

The appellants first complain that the trial court erred in denying them an evidentiary hearing on their motion for new trial. It is clear, however, that a motion for new trial may be decided upon affidavits without a hearing. *Gurleski v. United States*, 5 Cir. 1968, 405 F.2d 253, 267, *cert. denied*, 395 U.S. 981; *Lyles v. United States*, 5 Cir. 1959, 272 F.2d 910, *cert. denied*, 356 U.S. 931, 78 S.Ct. 773, 2 L.Ed.2d 761.

Appellants' next contention, that they were entitled to a new trial because one of the prosecuting witnesses had recanted his testimony that $2,000 had been extorted and that the appellants had located a witness present at the time the money was allegedly taken who would corroborate their version of the events, is also without merit. Testimony which is merely impeaching or cumulative is not a sufficient basis for a new trial based on newly discovered evidence. *E.g.*, *Mesarosh v. United States*, 1956, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1; *Batsell v. United States*, 8 Cir. 1968, 403 F.2d 395; *cert. denied*, 393 U.S. 1094, 89 S.Ct. 865, 21 L.Ed.2d 785. In the instant case the trial judge found that the witness, whose testimony appellants sought to impeach, had been subject to "one of the most severe cross-examinations that I have seen in

[1]Pursuant to our Rule 18 this case is decided without oral argument.

quite a long time." Accordingly, we are convinced that the trial judge did not abuse his discretion in refusing to grant the motion for new trial.

Appellants finally argue that the supplemental motion for new trial should have been granted because it was discovered, after the trial, that one of the Government's witnesses was a business associate of the foreman of the jury. While the voir dire is not reflected in the record there is no representation by the appellants that they requested a list of prospective witnesses which would have enabled them to discover the relationship on voir dire. This alone would establish a lack of diligence which would militate against granting a new trial. But more importantly, the witness who was associated with the foreman of the jury was not present in the room when the money was taken and appellants admit that his testimony "primarily alluded to facts circumscribing the alleged conspiracy." Since appellants were acquitted on the conspiracy count appellants have not met their burden of showing prejudice of the juror. *United States v. Provenzano*, 3 Cir. 1965, 353 F.2d 1011, *cert. denied*, 384 U.S. 905, 86 S.Ct. 1340, 16 L.Ed.2d 358.

AFFIRMED

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

August 10, 1970

Re: No. 28754-U.S.A. vs. Dara, Farinella and Esperti

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith. . .

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No. 43

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1970

SAM NICK FARINELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 668

SAM NICK FARINELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. F) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1970. A petition for rehearing was denied on August 10, 1970. The petition for a writ of certiorari was filed on September 9, 1970. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an evidentiary hearing was required before the district court could properly deny petitioner's motion for a new trial based on alleged newly discovered evidence.

2. Whether petitioner was entitled to a new trial on the basis of a discovery, after verdict, that the jury foreman was involved in business affairs with one of the government's witnesses who testified at trial with regard to a peripheral matter.

STATEMENT

This case is before the Court for the second time. After a jury trial, in the United States District Court for the Southern District of Florida, petitioner and two co-defendants, Dara and Esperti, were convicted of robbery (Count II, Pet. App. A-1) and extortion (Count III, Pet. App. A-2).[1] The court of appeals affirmed. *Esperti* v. *United States*, 406 F. 2d 148 (C.A. 5), certiorari denied, 394 U.S. 1000. The present petition seeks review of the denial of a subsequent motion for a new trial.

The evidence showed that Jack Maloney and Joe Yeager had a profit-sharing interest in Red Ball Merchandising Corporation, a Hialeah, Florida busi-

[1] Petitioner was acquitted on three other counts involving charges of conspiracy, a second robbery, and another extortion (Tr. 1107).

ness dealing in the marketing of closeout merchandise. On September 13, 1966, Maloney was in his office preparing a bank deposit slip for a $2,000 cash deposit received on a sale by Red Ball to a Chicago customer. (Tr. 186-189).[2] He walked into Yeager's office and there saw petitioner, Dara, and Esperti as well as Yeager and an employee of Red Ball named Waldorf. Esperti threw Maloney on a couch and told him that they were "here to get the $25,000 for the man in New York" (Tr. 190-193). Esperti and Farinella both brandished guns. Esperti placed his gun alternatively to the heads of Maloney and Yeager and repeatedly demanded immediate payment of the $25,000 (Tr. 193). Dara, who had left the room, then returned with the $2,000 in cash and deposit slip from Maloney's office, remarking "Look what I found." Esperti took it from him, adding "This don't count toward the $25,000" (Tr. 120-122, 194-195). Petitioner said "You've got a lot of merchandise out there. Sell it. Get the money." (Tr. 123, 196). Petitioner, Dara, and Esperti then left with the $2,000.

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[2] "Tr." followed by page reference refers to the five volume transcript of testimony given at petitioner's trial. "App." followed by page reference refers to the appendix containing the docket entries in the district court, the motion and supplemental motion for new trial involved in this petition, and transcripts of proceedings on those motions held on August 18, 1969 and October 6, 1969. A transcript of additional proceedings held on August 18, 1969 will be referred to as "Add. Tr.", followed by page reference. All these documents are being lodged with the Clerk.

After the affirmance in the court of appeals and the denial of the petition for a writ of certiorari, petitioner filed a motion for a new trial based on allegedly newly discovered evidence (App. 1). This purported new evidence was said to be that Yeager, who had not testified at the trial, would now say that he had never made the sale which produced the $2,000 in cash involved in the theft charge. No affidavit of Yeager was submitted but the trial judge did hear argument on whether a hearing was needed. Defense counsel said that Yeager would testify that he had never made the cash sale which yielded the $2,000 (App. 23). At a later hearing, counsel said that one of the witnesses, Waldorf, would recant his testimony that he saw the money being taken (App. 37-41). Government counsel pointed out that, at the trial, defense counsel had not contended that Yeager's testimony was needed. He told the court that the government had a statement from Mr. Yeager that defendants had indeed taken $2,000 (App. 24-25). In denying the motion, the judge noted that Maloney had been subjected to a severe cross-examination at trial (Pet. App. F-2-3; App. 29, 44) and that the existence or non-existence of the $2,000 had been thoroughly explored at that time (App. 29). Against this background, the trial court was of the view that nothing could be accomplished by a hearing.

In a supplemental motion, petitioner alleged that he had learned of a business relationship between Maurie Ashman, foreman of the jury, and Harvey Goodman, a government witness. Goodman testified at trial that he had been an intermediary in an at-

tempt by petitioner to persuade Maloney to take a trip and be unavailable to testify at the trial. (Tr. 673-675, 679-686, 688-693). The defense said that it could show that Goodman, who had a surety company, put up a bond for Ashman at the bank and that both were sued on the note (Add. Tr. 4). Defense counsel also claimed that the two men were reported to have had other dealings (Add. Tr. 4). In denying the motion, the court expressed its conviction that petitioner had received a fair trial (App. 55-58).

ARGUMENT

The district court acted within the scope of its discretion in denying the motion. See *United States* v. *Johnson*, 327 U.S. 106, 111; *Batsell* v. *United States*, 403 F. 2d 395, 403 (C.A. 8), certiorari denied, 393 U.S. 1094. Indeed, the court was not required to act at all on the mere hearsay statements of counsel. Petitioner has shown none of the requisites for a motion for a new trial based on newly discovered evidence. The existence of Yeager was known at the time of trial. Petitioner and his co-defendants then made no claim that they needed his testimony and there is no reason to believe his testimony would have affected the verdict. See *United States* v. *Costello*, 255 F. 2d 876, 879 (C.A. 2), certiorari denied, 357 U.S. 937; *United States* v. *Johnson*, 142 F. 2d 588, 592 (C.A. 7), certiorari dismissed, 323 U.S. 806.

As to the ~~busi~~ness relationship between witness and juror, the only specific fact shown was that the witness acted as surety on a bond. This is not the type

of close relationship from which bias can be inferred. Moreover, the witness was not present when the taking of the $2,000 occurred, but testified only to a collateral matter. The courts below were therefore justified in finding that the alleged business relationship could not be deemed so inherently prejudicial as to require a new trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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